Supreme Court, U.S.
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No. 02-297

In the Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE*, PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH and NEW JERSEY WORK ENVIRONMENT COUNCIL IN SUPPORT OF PETITIONER

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AFFIDAVIT OF JEROME BALTER, ESQUIRE

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I. INTEREST OF THE AMICI CURIAE[1]

The Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) is a non-profit organization of 150 local unions representing approximately 150,000 workers in the greater Philadelphia area. Established in 1975, it has provided education and training about job safety and health rights to tens of thousands of workers in its 27 year history. These educational programs include instructions about the statutory legal rights of workers under whistleblower statutes enacted by Congress to protect workers from retaliation by unscrupulous employers when workers report unsafe job conditions to their employers or to the relevant federal agencies.

The New Jersey Work Environment Council (WEC) is a non-profit organization of 60 labor, community and environmental organizations. WEC works for safe and healthy workplace environments. Such environments cannot be attained or maintained unless workers feel free to bring to the attention of their respective managements or to the relevant governmental agency, job safety concerns without fear of employer retaliation.

Both PHILAPOSH and WEC support Shannon Doyle's petition for a Writ of Certiorari because the opinion of the Third Circuit Court of Appeals would allow employers

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[1] The parties have consented to the filing of this brief under S.Ct. Rule 37.2 and the Letters of Consent have been lodged with the Clerk of the Court. Pursuant to S.Ct. Rule 37.6, Amici state that counsel for a party did not author the brief in whole or in part and that no one other than Amici, their members or their counsel have made any monetary contribution to the preparation or submission of this Brief.

to intimidate workers into a belief that workers will not have whistleblower protection if they were to report job safety concerns to their respective employers or to relevant federal agencies. Such beliefs adversely affect safety and health conditions in the workplace and in the areas outside the workplace.

II. STATEMENT OF THE CASE[2]

Petitioner Shannon Doyle, a resident of Alabama and an experienced nuclear radiation decontamination technician, was notified to report for work at the D.C. Cook nuclear energy facility in Bridgeman, Michigan in November 1988 (A51-56, 66)[3]. On arrival at the D.C. Cook facility Doyle was asked by his employer, Hydro Nuclear Systems (HNS), a subsidiary of Westinghouse (A-51), to complete several questionnaires and to endorse an "Authorization for Release of Information and Records" (A45). Doyle completed the questionnaires but objected to signing the HNS liability "release" provision which read as follows:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results of furnishing or receiving such information pursuant to this authorization.

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[2] Amici adopt and supplement the Petitioner's Statement of the Case.

[3] References are to the Appendix attached to Petitioner's Brief for a Writ of Certiorari.

> Hydro Nuclear Services is authorized to utilize the information it obtains for the purpose of evaluation [sic] my eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations. (A-45)

Doyle's objection to signing the HNS release was based on his belief that it would eliminate his whistleblower rights under the Energy Reorganization Act (ERA), 42 USC § 5851. The ERA reads as follows:

> No employer may discharge any employee or otherwise discriminate against any employee... because the employee...notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 USC § 2011 et seq.).

Doyle, therefore, requested HNS to amend its release to make clear that his endorsement would not cause him to lose his whistleblower rights (A55). HNS refused to clarify the release provision, Doyle refused to sign the release (A55) and HNS terminated Doyle's employment (A55). Thereafter in December 1988, Doyle filed an ERA complaint with the Department of Labor alleging that HNS' refusal to employ him was a violation of the ERA statute (A30).

Six (6) years later, in 1994, the Secretary of Labor published his Final Decision and Order on Doyle's complaint (A29 - A37) in which the Secretary decided that HNS had indeed violated the ERA and he therefore ordered HNS to offer employment to Doyle and to reimburse him for lost income (A35).

The following year, in 1995, the Nuclear Regulatory Commission (NRC), in its oversight capacity, issued a Notice of Violation to HNS for refusing to employ Doyle in 1988 (A60, A61) and six months later, in December, 1995, the NRC informed HNS that its release should be modified to make clear to employees and job applicants that endorsement of the HNS release does not affect their ERA rights. The NRC told HNS that such a modification was necessary because otherwise workers:

> [might] be swayed by his or her signing of such a waiver and discouraged from filing a claim of discrimination.

Exhibit A.[4]

Another seven (7) years later, in March 2002, 14 years after Doyle had first filed his ERA complaint, the Court of Appeals for the Third Circuit, in a split decision, overruled the Secretary's decision and dismissed Doyle's complaint (A21). The Third Circuit denied Doyle's request for a rehearing. (A27, A28). Doyle has now filed a Petition for a Writ of Certiorari for Supreme Court review of the Third Circuit opinion.

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[4] The NRC letter to HNS of December 26, 1995 is designated as Exhibit A of this Brief. It was included in the record of *Doyle v. Secretary of Labor*, No. 00-1589 and *Doyle v. Hydro Nuclear Services, Inc. v. Secretary of Labor*, No. 00-2035 (3d Cir. 2001). The letter was Addendum 14 of Doyle's Brief in those actions.

III. SUMMARY OF ARGUMENT

The Supreme Court should grant Mr. Doyle's Petition for Certiorari because the split decision of the Court of Appeals, if allowed to stand, will allow unscrupulous employers to intimidate their workers and thereby make them believe that they must waive their statutory whistleblower rights in order to obtain and maintain employment and if they do endorse the release they will be reluctant to report safety and health conditions on the job to HNS or to the NRC.

A workplace where workers and management are not cooperating to prevent injuries and fatalities is also a workplace that adversely affects the health and safety of the general public. And this situation is of particular significance for facilities in the nuclear industry in the post September 11, 2001 period.

The HNS release is designed to intimidate HNS workers. That was the view of Doyle, the Secretary of Labor, the Nuclear Regulatory Commission and the dissenting member of the Court panel which decided Doyle's case. The effect of the Court's opinion is to endanger the health and safety of these workers and the general public beyond the facility. It is particularly dangerous because of the possibility of terrorist activities at our nations' nuclear facilities.

The Supreme Court should grant a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit.

IV. ARGUMENT

-1-

Doyle's complaint, whether analyzed as a matter of statutory construction, as the Secretary of Labor did (A34), or as a matter of contract law as the Court did (A17, fn. 14), must be decided on the effect of the HNS release in relation to the intent of the whistleblower statute. 42 USC § 5851. The statute reads, in relevant part, as follows:

> No employer may discharge any employee or otherwise discriminate against any employee... because the employee... notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954...

By considering Doyle's complaint to be a matter of contract law, the Court circumvented the need to defer to the Secretary's decision unless that decision was arbitrary or capricious or an abuse of discretion.

- 2 -

The Court ruled that the HNS release did not affect Doyle's whistleblower rights and that the release was unambiguous. (A17, fn. 14). To reach these conclusions the Court had to disregard Doyle's interpretation of the release (A51-A56); the Secretary's interpretation (A29-A35); the interpretation of the Nuclear Regulatory Commission (NRC) (A57-61); the NRC's instructions to HNS to modify the release (Exhibit A), and the Court had to disregard the opinion of its own dissenting Judge who wrote:

> I would reject this release not just as a violation of Mr. Doyle's ERA Rights, but as a violation of all employees' rights. (Emphasis added)

(A23)

How, in the light of all these contrary opinions, the Court could declare that the HNS release was not ambiguous the court did not reveal. Very recently the Third Circuit, in *Lawson v. Fortis Insurance Company*, #01-3316, Sl. Op. p. 13 (3rd Cir. August 22, 2002) set forth a common sense test for determining whether an insurance policy provision was ambiguous. This common sense rule holds that if there are significantly different interpretations of the meaning of a provision it should be deemed to be ambiguous. Applied to the Doyle case this common sense rule would require the Court to find the HNS release to be ambiguous though, perhaps, leaning in the direction of the Secretary's interpretation.

- 3 -

Though the Court's judgment was based on its finding that the HNS release was unambiguous it, nevertheless, put forth a fall-back position if the release was considered to be ambiguous. Under this view the Court declared that the ambiguous release should not be construed so as to make it illegal. The Court cited *Walsh v. Schlect*, 429 U.S. 401 (1977) in support of its argument but the Court's interpretation of *Walsh* was incorrect. The *Walsh* case concerned a labor-management contract provision related to the Davis-Bacon Act, 40 USC § 276(a), that established minimum pay rates. The Supreme Court found the contract provision to be ambiguous and then interpreted it so that it

served the intent of the Davis Bacon Act. Under that guide the Court said that the Davis-Bacon Act:

> was not enacted to benefit contractors, but rather to protect employees from substandard earnings.

429 U.S. at 411.

Had Doyle's Court followed the teachings of *Walsh v. Schlect* it would have been obliged to deem the HNS release to be a violation of the ERA because the ERA was not designed to benefit employers who use equivocal legal language to circumvent the ERA and thereby to intimidate their workers, but rather; the ERA's intent is to protect workers from employer retaliation and thereby to induce workers to report matters of health and safety to their employers and governmental agencies.

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The Court accepted the HNS interpretation that it required Doyle to sign the release in order to complete its employment investigation of Doyle (A17, A18). To accept HNS' alibi it is necessary to close one's eyes to the facts and to disregard all logic. It is uncontested that Doyle voiced no objection to HNS' investigation of his employment qualifications. When HNS requested a liability release from Doyle he agreed to give it so long as he could be assured that his endorsement would not affect his ERA rights (A54). If, as HNS contends, the release was not intended to coerce or intimidate and it was not intended to abrogate workers' ERA rights, HNS could have satisfied Doyle's 1988 request in 15 minutes or less. Seven years later, in 1995, HNS was still using the same release or a similar release and the NRC wrote

to HNS that the HNS release may cause an applicant for employment "to be swayed by his or her signing of such a waiver and discouraged from filing a claim of discrimination," (Exhibit A). The NRC then supplied HNS with language to modify the HNS release which in relevant part read as follows:

> "This release neither waives the right to file a complaint and obtain a remedy . . . nor does it release anyone from liability for illegal, discriminatory or prohibited acts under the ERA . . . or other NRC regulations."

Exhibit A.

The Court did not question why HNS, a year after the Secretary's decision in the Doyle case, had not invested fifteen (15) minutes to modify its release provision so as to ensure employees and job applicants that the release would not cause them to lose their ERA rights. Instead of fifteen (15) minutes HNS has been engaged in a fourteen (14) year campaign against Doyle to maintain the HNS release in the incomprehensible form they presented it to Doyle back in 1988.

- 5 -

The Court declared that even if the HNS release was a violation of the ERA it did not discriminate against Doyle because HNS had not singled him out and had not treated him less favorably than others similarly situated (A18). The ERA, however, is intended to prevent employer retaliation against any worker who reports job safety and health concerns to management or the NRC. Whether Doyle was treated the same as other employees is not the issue. The Court's

opinion suggests that if an employer retaliates against each and every worker who is so bold as to report job safety and health problems, the employer would not violate the ERA. Such an interpretation of the ERA is not believable; it is without question a violation of the ERA. The ERA protects each and every worker from employer retaliation whether or not the employer is also in violation of other employment law related to discrimination. Indeed the Secretary recognized that the HNS release was an illegal threat to all workers (A33).

The NRC uses the term "discrimination" to mean "firing, reduction of pay, poor performance appraisals and reassignment to a lower position or job (if it can be established that these actions were taken by the [employer] because a worker raised safety concerns." (NUREG/BR-0240 Rev.1). NRC's interpretation of "discrimination" in the ERA is clearly different from that of the Court's.

- 6 -

The Court declared that Doyle and other workers are obliged to sign the HNS release because if the release is deemed to be illegal it would not be enforceable. Thus the release could not have any adverse effect on Doyle's ERA rights (A16). This is truly a Heads I Win-Tails You Lose situation.

The Court's judgment that HNS had not violated the ERA when it refused employment to Doyle required the Court to employ some arcane legal theories, which most lawyers might find difficult to follow. Yet the Court would expect workers to appreciate these legal theories when applying for employment with HNS or other establishments that require endorsement of similar liability releases. It is doubtful that in

enacting the ERA or similar whistleblower protective statutes Congress expected workers would need the assistance of attorneys or retired Judges to obtain employment.

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Congress has assigned the Secretary of Labor to be the administrator of the ERA and at least eleven other whistleblower statutes.[5] The Secretary, thereby, is the most knowledgeable and experienced government representative in respect to whistleblower law enforcement. The Court's circumvention of the Secretary's decision on the complaint of Mr. Doyle opens the way for other Courts of Appeals to

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[5] Laws with whistleblower protections administered by the Secretary of Labor.

- The Occupational Safety & Health Act of 1970 29 USC § 660.
- The Surface Transportation Assistance Act 49 USC § 20109.
- The Asbestos Hazard Emergency Response Act 20 USC §§ 3608, 4018.
- The International Safety Container Act 46 USC § Appx 1506.
- The Energy Reorganization Act (Nuclear Power Plants) 42 USC § 5851.
- The Clean Air Act 42 USC § 7622.
- The Safe Drinking Water Act 42 USC § 300j-9
- The Federal Water Pollution Control Act 33 USC § 1367.
- The Toxic Substances Control Act 15 USC § 2622.
- The Solid Waste Disposal Act 42 USC § 6971.
- The Comprehensive Environmental Response, Compensation and Liability Act 42 USC § 9610
- The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century 49 USC § 42121.

review the Secretary's decision on a de novo basis, without need to defer to the Secretary's decision. Unless the Supreme Court limits this type of circumvention it can be expected that similar cases will produce conflicting rulings in the various appellate districts and jeopardize the value of the extensive whistleblower experience that the Secretary has accumulated over the years.

On the basis of his whistleblower enforcement experience the Secretary ruled that HNS had violated the ERA (A35) and the NRC agreed with the Secretary. The NRC found that HNS' denial of employment to Doyle could be intimidating and coercive and that HNS' refusal to employ Doyle violated the ERA. See (A57, A61) and Exhibit A.

The Secretary's decision was not arbitrary or capricious or an abuse of discretion. The Court should have deferred to the Secretary's decision.

V. THE JUDGEMENT OF THE COURT OF APPEALS THREATENS HEALTH AND SAFETY OF ALL AMERICANS

That worker/management cooperation is absolutely necessary for preventing injury to workers and the general public is revealed by recently published statistics. In the most recent year for which data is available, the year 2000, the Bureau of Labor Statistics reported that there were 5,915 occupational fatalities[6] and over 110,000,000 occupational injuries, more than 6 for every 100 workers.[7]

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[6] http://www.bls.gov.iif.oshwc.cfoi.cftb141.txt

[7] http://www.bls.gov/iif/oshwc/osh/os/osnr0013.txt

Many of these fatalities and injuries may not have been prevented; but the Secretary of Labor and the Nuclear Regulatory Commission recognize that worker/management cooperation provides the best opportunity to undertake preventive action to reduce injuries and fatalities. When management, such as HNS, creates a coercive intimidating atmosphere it is far less likely that their workers will bring job problems and potential problems to the attention of management and therefore it is far more likely that injuries and fatalities will occur. HNS' refusal to make a simple modification to its release provision could not engender the worker/management cooperation needed for making a safer industrial environments.

The activities of workers in their places of work also affect the safety and health of the general public. We are all familiar with the great tragedy of Bhopal where in 1984 far more people outside the Union Carbide plant died and were permanently injured from the release of methyl isocyanate than in the 9/11 terroristic attack on the World Trade Center.[8]

And we all know of the meltdown of the nuclear energy plant in Chernobyl in 1986 where the people around the plant were exposed to radioactivity 100 times greater than the radiation exposure from the Hiroshima A-Bomb.[9]

And we should remember the Three Mile Island (Pennsylvania) nuclear accident in 1979 when there was a radiation leak from a partial meltdown and all pregnant

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[8] http://www.bhopal.com/review.htm

[9] http://www.chernobyl.com/info.htm

women and preschool children living within five (5) miles of the facility were evacuated.[10]

We recall the spill of the Exxon Valdez in 1989 when eleven (11) million gallons of crude oil spilled into Prince William Sound, with disastrous effect to the environment, to the food chain, to the birds and wildlife of that once pristine area.

And we also are aware of rail and truck spills of hazardous materials which not only affect the safety and health of railroad employees and truck drivers but also affect the health and safety of the surrounding public and causes them to be evacuated.

The need for work/management cooperation to protect nuclear plant workers is particularly important in the aftermath of the terrorist attacks of September 11, 2001 because the affects of a terrorist attack on a nuclear facility would be so catastrophic. Therefore workers should be encouraged to report job conditions which may affect the continuous safe operation of nuclear plants so that management and the NRC have an early opportunity to immediately investigate and undertake any necessary remedial action. Such worker/management cooperation is not encouraged by managements who insist on enforcement of HNS type liability releases.

The need for worker/management cooperation in the nuclear industry was recognized by the Secretary of Labor in *Hill v. T.V.R.* 87 ERA 23, 24 (1989):

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[10] http://www.acsh.org/publications/reports/island_0399.html

> In the nuclear power industry, given the magnitude of the potential hazards to employees and public safety and health, there is an especially compelling need to keep open the channels of communication regarding potential safety and health violations.

What was true in 1989 is even more true today. The dissenting Judge in the Doyle case also recognized the disastrous effects that can result when nuclear plant workers are concerned about both job safety and job employment. Here is how he ended his dissenting opinion:

> We have upheld an employer's ability to make its employees uncertain about the status of their whistleblower rights. We have thereby dealt a blow to the safety of the nuclear industry.

(A24).

The health and safety of our nation in significant measure depends on the safe operation of our industrial workplaces. The ERA was enacted to provide workers the right to participate with management in attaining and maintaining safe workplaces. The Court of Appeals, however, would enable managements to intimidate workers so that they refrain from bringing safety or health problems to management or the NRC, precisely the situation that the ERA is intended to overcome. The Court of Appeals, thereby has endangered the safety and health of the workers and the safety and health of the public.

VI. CONCLUSION

Oliver Wendell Holmes, Associate Justice of the U.S. Supreme Court from 1902 to 1932, in his lectures on the Common Law, offered the following advice:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

The Common Law, Oliver Wendell Holmes, 1881.

Had the Court of Appeals for the Third Circuit been guided by Holmes' wisdom they would not, in the year 2002, have reversed the decision of the Secretary of Labor of 1994. The U.S. Supreme Court should grant Mr. Doyle's petition for a Writ of Certiorari so that it can reverse the opinion of the Third Circuit and thereby protect the rights of Mr. Doyle and the safety and health of all Americans.

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
BY: JEROME BALTER

Counsel for Amici Curiae
PHILAPOSH and W.E.C.

BEST AVAILABLE COPY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 26, 1995

Patricia Stafiej, President
Westinghouse Staffing Services
P.O. Box 158
Madison, Pennsylvania 15663-0158

Dear Ms. Stafiej,

This is to acknowledge receipt of your September 16, 1995 letter concerning the Notice of Violation (Notice) issued by the Nuclear Regulatory Commission on June 18, 1995 to Hydro Nuclear Services. The Notice was issued in the matter of Shannon Doyle v. Hydro Nuclear Services, DOL Case Number 89-ERA-022.

I note that Westinghouse denies the violation and that Westinghouse has appealed the Secretary of Labor decision in the case to the Third Circuit Court of Appeals. The NRC will monitor the Third Circuit proceeding and, if the Secretary of Labor's decision is overturned, the NRC will reevaluate its enforcement action.

With respect to Westinghouse's Access Authorization Programs Questionnaire, the NRC notes that the Secretary of Labor said that a "waiver of rights under the [Energy Reorganization Act] could not be raised by Respondent as a defense" (Secretary of Labor's Final Decision and Order, March 30, 1994, at 6). However, the applicant for employment may be swayed by his or her signing of such a waiver and discouraged from filing a claim of discrimination, thinking that the waiver prevented such a claim. You indicated in your letter that the release language in question was and is not intended to preclude an employee or prospective employee from bringing a claim of discrimination. To make that clear to employees and prospective employees who are required to sign the release, the NRC recommends that the Westinghouse Access Authorization Programs Questionnaire be amended to insert a sentence, after the phrase "information released in good faith" as follows:

> "This release neither waives the right to file a complaint and obtain a remedy pursuant to the protection provided by Section 211 of the Energy Reorganization Act (ERA) of 1974, 42 U.S.C. Section 5851, as amended, nor does it release anyone from liability for illegal, discriminatory or prohibited acts under the ERA, the Atomic Energy Act, 10 CFR 50.7, or other NRC regulation."

If you have any questions on this matter, you may contact me at (301) 415-2741.

Sincerely,

James Lieberman, Director
Office of Enforcement

EXHIBIT A

ADDENDUM

Received Time Aug.12. 10:08AM

AFFIDAVIT

Commonwealth of Pennsylvania

County of Philadelphia

Jerome Balter, being of age and duly sworn according to the law, deposes and says he is an attorney employed by the Public Interest Law Center of Philadelphia and that he represents the Philadelphia Area Project On safety and Health (PHILAPOSH) and the New Jersey Workers Environment Council (WEC); who are submitting an Amici Curiae Brief in behalf of Shannon T. Doyle's petition for a Writ of Certiorari.

The Amici Curiae brief includes Exhibit A, which is a letter of the Nuclear Regulatory Commission (NRC) to Westinghouse Staffing Services (successor to Hydro Nuclear Services). The NRC letter is dated December 26, 1995. The letter was not included in the appendix of the petition Mr. Balter discovered the letter in a Brief dated May 1, 2001 submitted by Doyle in Doyle v. Hydro Nuclear Services #00-1589 and #00-2835. The Nuclear Regulatory Commission letter of 12/26/95 was included as "Addendum #14" of that Brief.

Jerome Balter

Sworn to and Subscribed
before me this 20 day
of September, 2002

Cynthia A Warfield

NOTARY PUBLIC

NOTARIAL SEAL
CYNTHIA A. WARFIELD, Notary Public
City of Philadelphia, Phila. County
My Commission Expires May 5, 2002

Sep.23. 2002 2:15PM NO.9284 P.4